

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7628

Joint Petition of Green Mountain Power Corporation,)
Vermont Electric Cooperative, Inc., and Vermont)
Electric Power Company, Inc. for a certificate of public)
good, pursuant to 30 V.S.A. Section 248, to construct up)
to a 63 MW wind electric generation facility and)
associated facilities on Lowell Mountain in Lowell,)
Vermont, and the installation or upgrade of)
approximately 16.9 miles of transmission line and)
associated substations in Lowell, Westfield and Jay,)
Vermont)

Order entered: 9/6/2011

ORDER RE MOTIONS FOR STAY AND MOTION FOR CLARIFICATION

INTRODUCTION

On May 31, 2011, the Public Service Board ("Board") issued an Order (the "May 31 Order") and Certificate of Public Good ("CPG") in this docket approving, subject to certain conditions, the construction and operation of the proposed wind electric generating facility. On July 12, 2011, in response to motions filed by a number of parties to this proceeding, the Board issued its Order re: Motions and Requests for Modification, Amendment, Clarification and Correction (the "July 12 Order").

On July 25, 2011, the Towns of Albany and Craftsbury jointly (the "Towns") and Lowell Mountains Group, Inc. ("LMG") each filed a Motion for Stay Pending Appeal. Additionally, LMG filed a Motion for Clarification of the Board's May 31, 2011, Order. In their motions for stay, both the Towns and LMG assert that they are likely to prevail on the merits of their appeals, a stay is necessary to prevent irreparable harm, a stay will not substantially harm other parties, and a stay will best serve the public interest.

On August 9, 2011, Green Mountain Power Corporation ("GMP") filed its Opposition to Motions to Stay and Response to Motion for Clarification. No other party filed comments on the Towns' or LMG's Motions.

On August 12, 2011, the Towns filed their Reply to GMP's Opposition. LMG did not file a reply.

In this Order we deny both the Towns' and LMG's Motions for Stay Pending Appeal because they have failed to demonstrate that they are likely to succeed on the merits of their appeals, that they will suffer irreparable harm if a stay is not granted, that non-moving parties will not be substantially harmed if a stay is granted, and that the public interest will be served by the grant of a stay. We also deny LMG's Motion to Clarify because the May 31 Order is clear and speaks for itself.

THE LEGAL STANDARD

The filing of a notice of appeal of an Order of the Board does not automatically stay the effect of that Order. Rather, 30 V.S.A. § 12 provides that an appeal does not stay the effect of a Board order, unless the Board or Supreme Court grants a stay, while 3 V.S.A § 815 provides that the administrative agency whose order has been appealed (i.e., the Board), "may grant, . . . a stay upon appropriate terms." Neither statutory provision delineates the criteria that the Board must apply in deciding whether to grant a stay. However, in evaluating requests to stay the effect of a Board order pending appeal, the Vermont Supreme Court has in the past examined four factors, which it has characterized as "helpful generalizations:" (1) the likelihood of success of the appealing party on the merits; (2) whether the party seeking the stay will suffer irreparable injury if the stay is not granted; (3) whether the issuance of a stay will substantially harm other parties; and (4) the location of the best interests of the public.¹

1. *In re Tariff Filing of New England Telephone & Telegraph Co.*, 145 Vt. 309, 311 (1984) (citing *In re Allied Power & Light Co.*, 132 Vt. 554, 556 (1974)).

We have used these factors to evaluate past requests for stays of our orders² and do so here.

The Towns' Motion

The Towns seek "a stay of the Certificate of Public Good" and "a temporary stay of all tree clearing and construction activities for the Kingdom Community Wind Project pending appeal to the Vermont Supreme Court."³ The Towns assert that the Board erred in its July 12 Order when it granted the part of GMP's Motion for Reconsideration⁴ that sought to extend the deadline for obtaining the habitat fragmentation-connectivity easements (the "Easements") required under the Natural Resource MOU⁵ until December 31, 2011. The Towns contend that the Board should have disregarded that part of GMP's motion because it was not properly before the Board, GMP having raised the issue for the first time in its reconsideration request. The Towns further assert that, even if it were permissible for the Board to entertain the request to extend the deadline, the Board improperly balanced GMP's economic interests against the project's impacts to the natural environment in conflict with its findings in the May 31 Order and the Board's mandate pursuant to 30 V.S.A. § 248(b)(5). Lastly, the Towns contend that the Board's conclusions regarding impacts to two state-significant natural communities are unsupported by the record.

Green Mountain Power Opposition

In its opposition, GMP contends that the Towns have failed to demonstrate likelihood of success on the merits of their appeal because the Board appropriately exercised its discretion in considering GMP's request to modify the deadline for obtaining the Easements, because the Board's consideration of the economic impacts from a pre-construction deadline was proper

2. See e.g., *In re Vermont Yankee Nuclear Power Corporation*, Docket 6545, Order of 1/24/02.

3. Towns' Motion at 1. The relief requested by the Towns appears, as a practical matter, to be a request for a stay of the Board's May 31, 2011, Order approving the project and issuing the Certificate of Public Good.

4. GMP filed the motion with the Board on June 14, 2011.

5. The "Natural Resources MOU" is a Stipulation between GMP and the Agency of Natural Resources dated 2/23/11 and entered into the evidentiary record as exhibit GMP-ANR-1.

under Section 248, and because the evidentiary record does not support a finding of undue adverse impact to natural resources based on impacts to two state-significant natural communities. GMP further contends that the Towns have not demonstrated irreparable harm since there will be no undue adverse impact to the natural environment even if the Easements are obtained after fragmentation occurs, and that it is highly likely that GMP will be able to secure the Easements. GMP also argues that a stay will cause it substantial harm, and the Towns incorrectly applied a standard of irreparable harm to GMP. Lastly, GMP asserts that granting a stay is not in the public's interest because the Board has already found that, subject to certain conditions, the project is consistent with the general good of the state, and delaying the project would substantially increase project costs and threaten its viability.

DISCUSSION

For the reasons set forth below, we deny the Towns' Motion for Stay Pending Appeal.

A. Likelihood of Success on the Merits

We deny the Towns' motion because they have failed to demonstrate that they are likely to succeed on the merits of their appeal for any of the three issues identified in their motion.

1. Consideration of GMP's Motion

The Towns argue that it was error for the Board to have even considered that part of GMP's motion that sought modification of the deadline to obtain the Easements because GMP improperly raised the issue for the first time in its reconsideration motion. The Towns contend that GMP either knew or should have known by April, 2011, that a pre-construction deadline for obtaining the Easements would cause a delay in project construction and therefore should have raised the issue in its April 4, 2011, reply brief in response to an argument made in support of a pre-construction deadline in the Towns' initial brief.⁶ The Towns assert that GMP's failure to address the issue in its reply brief was a tactical decision which cannot be corrected through a

6. Towns' Motion at 6-7, 10.

reconsideration motion.⁷ Finally, the Towns point to an August 11, 2011, letter from GMP to the Board which the Towns claim constitutes an admission by GMP that it knew as early as February, 2011, that obtaining the Easements pre-construction might be problematic and that prior representations to the contrary were therefore misleading.⁸

GMP asserts that when it filed its reply brief it was unaware that a pre-construction deadline for obtaining the Easements would delay commencement of project construction and thereby place the availability of federal Production Tax Credits ("PTCs") for the project at risk, and therefore could not have raised the issue at that time.⁹ GMP also argues that it is not reasonable to assume that it should have known by early April that a pre-construction deadline for obtaining the Easements would delay the project because it was focusing its efforts on numerous other activities at the time, including discovery on surrebuttal testimony, preparation for and participation in the technical hearings, drafting its initial brief, pursuing collateral permits, and other actions necessary to comply with expected CPG conditions. In conjunction with the fact that ANR had agreed to a pre-operations deadline for obtaining the Easements, GMP asserts that developing a time frame for obtaining the easements was not, and should not have been, a priority during that time.¹⁰

We deny the Towns' motion because consideration of GMP's request to change the deadline for obtaining the Easements was based on the exercise of sound Board discretion. The disposition of a motion to alter or amend a judgment rests with the discretion of the trial court.¹¹ Rule 59(e) gives courts "broad power to alter or amend a judgment."¹² In addressing a Rule 59(e) motion "the court may reconsider issues previously before it, and generally may examine the correctness of the judgment."¹³ The purpose of Rule 59(e) is to avoid an unjust result due to

7. Towns' Motion at 11.

8. Towns' Reply at 4-5.

9. GMP Opposition at 3.

10. GMP Opposition at 4-5.

11. *Alden v. Alden*, 2010 VT 3, ¶ 7 (citations omitted).

12. V.R.C.P. 59(e) Reporter's Notes.

13. *Drumheller v. Drumheller*, 2009 VT 23, ¶ 29 (citing *In re Robinson/Keir Partnership*, 154 Vt. 50, 54 (1990) (citations omitted)).

inadvertence of the Board, as opposed to that of a party.¹⁴ The rule is not intended to permit parties to relitigate issues or correct previous tactical decisions.¹⁵ The motion must "present facts which could not, with the exercise of due diligence by counsel, have been placed before the court before the order complained of was issued."¹⁶

The August 11, 2011, letter from GMP to the Board raises significant concerns about GMP's earlier claims that it did not know prior to filing its reconsideration motion that it might be unable to obtain the Easements prior to its planned construction commencement date of August 1, 2011. In that letter, GMP states that it requested, and ANR agreed to, the pre-operational deadline for the Easements, "out of GMP's concern that procurement of the fragmentation easements could potentially take longer than the other easements. Similarly, efforts in pursuing the easements between early January and early April also reinforced this potential result, although not eliminating the possibility that the easements could not be obtained prior to construction."¹⁷ The letter indicates that GMP was concerned as early as February 23, 2011, when the Natural Resource MOU was executed, about its ability to obtain the Easements in time to commence construction by August 1, 2011, if a pre-construction deadline were imposed. The August 11, 2011, letter leads us to conclude that GMP should have raised the issue of the potential loss of the PTCs that would result from a pre-construction deadline in its reply brief in response to the Towns' argument in their initial brief in support of a pre-construction deadline for obtaining the Easements.

However, GMP's failure to do so does not present an absolute barrier to our reconsideration of the deadline for obtaining the Easements. Rule 59(e) is a codification of a trial court's "inherent discretionary power" to open and correct and modify or vacate its judgments.¹⁸ Under Rule 59(e), the trial court is permitted to examine the correctness of any issue in the

14. *Osborn v. Osborn*, 147 Vt. 432, 433 (1986).

15. *In re Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3.

16. *Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3 (quoting *Brown v. International Harvester Corp.*, 142 Vt. 140, 142-43 (1982)).

17. The Natural Resource MOU requires GMP to obtain certain other easements and imposes a pre-construction deadline for their execution and delivery.

18. *West v. West*, 131 Vt. 621, 623 (1973).

record, even ones not raised by the parties in their Rule 59(e) motions.¹⁹ Given the inherent discretionary power of trial courts to reconsider issues previously before them, and to consider generally the correctness of a judgment, the Board had the discretion to reconsider the imposition of a pre-construction deadline for obtaining the Easements, particularly where the Board was unaware that such a deadline could cause the loss of the PTCs and raise concerns about the project's economic viability. While it would have been preferable for GMP to have raised in its reply brief its potential inability to obtain the Easements prior to August 1, 2011, the failure to do so does not eliminate the Board's inherent discretion to reconsider its initial decision. Given that a trial court may examine the correctness of any issue in the record, even ones not raised by parties in their Rule 59(e) motions, it would be a peculiarly illogical result if GMP's failure to directly respond to the Town's arguments during the briefing phase of this proceeding could be deemed to eliminate that discretion.

Lastly, the nature of a Section 248 proceeding reinforces the discretion of the Board to reconsider the Easement deadline. "When the Board evaluates a petition for a CPG under 30 V.S.A. § 248, it is engaging in a 'legislative, policy-making process.' The Board must exercise its discretion 'to weigh alternatives presented to it, utilizing its particular expertise and informed judgment.'"²⁰ The ultimate question to be decided in a Section 248 proceeding is whether a proposed project will promote the general good of the state.²¹ Section 248 proceedings are not disputes between private parties, and interpretation of Rule 59(e) and its legal precedent in a manner that presents an absolute bar to Board reconsideration of a decision that would otherwise result in unintended consequences and possibly lead to the demise of a project that has been determined to be consistent with the public good, would be counter to the purpose of Section 248 proceedings.

For the foregoing reasons, we conclude that the Towns are not likely to succeed on the merits of their appeal on this issue.

19. *Drumheller v. Drumheller*, 2009 VT 23, ¶¶ 32-33.

20. *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 2 (quoting *In re Vt. Elec. Power Co.*, 2006 VT 69, ¶ 6).

21. *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 7.

2. Consideration of Potential Economic Impacts

The Towns argue that the Board improperly considered the economic interests of GMP in deciding whether to amend the deadline for obtaining the Easements. The Towns contend that GMP's economic interests cannot be balanced against the potential for undue adverse impacts to the natural environment under the plain language of Section 248. The Towns argue that the Vermont Supreme Court has only allowed consideration of economics with respect to aesthetic issues, and has never extended the same reasoning to natural resource impacts.

GMP argues that the Board properly considered the economic implications associated with the pre-construction deadline because analysis of a petition under 30 V.S.A. § 248 is a "legislative, policy-making process."²² GMP contends that this permits the Board to balance the impacts under the criterion at issue with other impacts in reaching a determination of what constitutes an undue impact.

We deny the Towns' motion because the Towns misunderstand the basis for our decision to extend the deadline for obtaining the Easements. The basis for extending the deadline is unrelated to GMP's profitability²³ and is instead directly related to promoting the general good of the state. "When the Board evaluates a petition for a CPG under 30 V.S.A. § 248, it is engaging in a 'legislative, policy-making process.' The Board must exercise its discretion 'to weigh alternatives presented to it, utilizing its particular expertise and informed judgment.'"²⁴ The ultimate question to be decided in a Section 248 proceeding is whether a proposed project will promote the general good of the state.²⁵

In this instance, we found that "the benefits of constructing and operating the proposed project outweigh its impacts and will promote the general good of the state, because it will be a source of long-term, stably priced power for GMP and VEC, and because it will assist the state in

22. GMP Opposition at 5 (*quoting In re UPC Wind, LLC*, 2009 VT 19, ¶ 2).

23. The Towns argue that the Board has placed the natural environment at risk for undue adverse impacts "simply for the potential of ensuring that the Petitioners can maximize their profits through federal tax credits." Towns' Motion at 13. Not only are the Towns incorrect in their interpretation of our reasoning for extending the deadline, their argument also evidences a fundamental lack of understanding about regulated utility ratemaking principles. Any cost reductions resulting from the production tax credits would flow through to ratepayers in rates and would not serve to "maximize" profits for GMP.

24. *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 2 (*quoting In re Vt. Elec. Power Co.*, 2006 VT 69, ¶ 6).

25. *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 7.

meeting its legislated policy goals associated with the development of renewable power projects."²⁶ We also found, based on sworn testimony, that project construction needed to commence by the beginning of August, 2011, to ensure access to the federal PTCs,²⁷ and that delaying commencement of construction would create the potential for loss of the PTCs, thereby creating a risk to the economic viability of the project.²⁸

This potential threat to the viability of a project that was found to promote the general good of the state provided the context in which we were required to consider the appropriateness of moving the deadline for obtaining the Easements. In approving the modification to the deadline for obtaining the Easements, we considered all of the arguments put forth by the various parties and took steps to minimize any potential risk to the natural environment, in particular, by making it clear to GMP that once it begins construction and habitat fragmentation commences, it will not be excused from its obligation to procure adequate mitigation regardless of the project's successful completion or otherwise. We also found it important that ANR, the agency charged with protecting the state's natural resources, is amenable to allowing construction to commence prior to GMP obtaining the Easements. Lastly, we were cognizant of the state's legislated policy objective of promoting the construction of new renewable generating facilities in Vermont. Taking all these factors into account, we exercised our discretion and concluded that the general good of the state would best be served if construction could be completed in a timely fashion so that access to the PTCs would be preserved, and that the risk to the natural environment was sufficiently minimized to move the deadline. GMP's financial status was not related to our decision.

For the foregoing reasons, we conclude that the Towns are not likely to succeed on the merits of their appeal on this issue.

26. Docket 7628, Order of 5/31/11 at 144.

27. Docket 7628, Order of 5/31/11 at 22. The Towns characterize the August 1, 2011, date as "arbitrary" and based on nothing more than "empty claims by the Petitioners." Towns' Motion at 13. Contrary to the Towns' characterizations, the August 1, 2011, date for commencing construction was the subject of sworn testimony during the evidentiary phase of this proceeding. *See, e.g.*, tr. 2/3/11 at 120-21 (Pughe).

28. Docket 7628, Order of 7/12/11 at 8.

3. Impacts to State-Significant Natural Communities

The Towns assert that the evidentiary record shows there will be an undue adverse impact to natural resources due to tree clearing that will take place within two state-significant montane forest communities and the Board's finding of no undue adverse impacts to natural resources is therefore unsupported by the record.²⁹ The Towns argue that the Board improperly relied on the Natural Resource MOU to reach its conclusion that there would be no undue adverse impact to the two state-significant montane forests, because testimony from an ANR witness shows that the Natural Resource MOU does not reduce the impacts to those communities.³⁰ The Towns further argue that this same ANR witness, Mr. Sorenson, testified that there would be an undue adverse impact to the natural environment because of those impacts, even with the mitigating actions required by the Natural Resource MOU.³¹

GMP contends that the Towns are misconstruing the testimony of Mr. Sorenson by claiming that he testified that the impacts to the montane forests in and of themselves, which would render them no longer state-significant, were undue. Rather, GMP asserts, Mr. Sorenson stated that it was the loss of state-significant status for the communities together with the habitat fragmentation effects from constructing the project that created an undue adverse impact in the absence of adequate mitigation. GMP argues that Mr. Sorenson actually testified that the Natural Resource MOU sufficiently mitigates habitat fragmentation so that the clearing associated with the project has an adverse, but not an undue, impact.³²

We deny the Towns' motion because their arguments are premised on an inaccurate reading of both Mr. Sorenson's testimony and our Orders. The Towns quote limited excerpts from the relevant testimony of Mr. Sorenson which, when read in their entirety, make clear his actual opinion that it was a combination of numerous adverse impacts that, absent adequate mitigation, would result in an undue adverse impact. Mr. Sorenson went on to explain that the Natural Resource MOU, while not mitigating each and every adverse impact that he was

29. Towns' Motion at 17-18.

30. Towns' Motion at 18-19; Towns' Reply at 10-11.

31. Towns' Motion at 17-19.

32. GMP Opposition at 7-9.

concerned with, mitigated enough of them so that the overall project impacts were rendered adverse, but not unduly adverse.³³ Our finding is thus firmly supported by the record.

With respect to our Orders, the Towns incorrectly argue (1) that we found that the project would have an undue adverse impact on the natural environment solely due to clearing in the two state-significant montane forest communities, and (2) that we then erroneously concluded that the Natural Resource MOU would reduce the impacts to those communities to the point where the impacts would be adverse, but no longer undue. The Towns base this argument on certain language in the May 31, 2011, Order that was contained in the section discussing state-significant natural communities.³⁴ The language the Towns point to states, "Nevertheless, we find that the mitigation and decommissioning measures provided by the Natural Resource MOU, **as discussed below as they relate to necessary wildlife habitat and endangered species**, will limit the impacts of clearing to being adverse in nature, rather than unduly adverse."³⁵ It is clear that we were not discussing the impacts to the state-significant communities in isolation when referring to potentially undue impacts. We were instead discussing the overall clearing impacts of the project with respect to necessary wildlife habitat and endangered species, and impacts to necessary wildlife habitat are mitigated by the terms of the Natural Resource MOU.³⁶

For the foregoing reasons, we conclude that the Towns are not likely to succeed on the merits of their appeal on this issue.

B. Irreparable Harm to Movants

We also deny the Towns' motion because they have failed to demonstrate that irreparable harm will result by virtue of changing the deadline for GMP to obtain the Easements.

The Towns argue that clearing for the project will have permanent habitat fragmentation impacts if adequate mitigation is not secured. The Towns contend that there is no evidence to

33. Tr. 2/24/11 at 192-95 (Sorenson).

34. Towns' Reply at 10.

35. Docket 7628, Order of 5/31/11 at 115 (emphasis added).

36. This should have become clear to the Towns after we issued our July 12, 2011, Order addressing various reconsideration motions filed by the parties. In that Order, we clarified that our review of a project's overall impacts to natural resources includes state-significant communities even if they are not considered rare and irreplaceable natural areas. Docket 7628, Order of 7/12/11 at 20-21.

support the conclusion that adequate easements will be obtained, only that they might be obtained. Therefore, the Town's argue that no tree clearing should be allowed until adequate mitigation is in place.³⁷

GMP argues that the Towns have not shown that irreparable harm will occur as a result of the fragmentation itself, because the Board found that there would be no undue adverse impacts as long as adequate mitigation is obtained. GMP asserts that the Towns have claimed only that the Easements might not be obtained, and have not demonstrated that they will not be obtained. GMP also states that the record shows that it is likely that it will be able to obtain the Easements.³⁸

We deny the Towns' motion because their arguments fail to account for the fact that GMP is required to obtain adequate mitigation in order to offset the habitat fragmentation impacts of the project. Accordingly, even if the parcels currently under consideration become unavailable or prove to be otherwise inadequate, GMP must provide adequate mitigation for any fragmentation that results from the project.³⁹ Since GMP is required to obtain mitigation to offset the impacts of clearing associated with the project, the harm is, by definition, not irreparable.⁴⁰

C. Substantial Harm to Non-Moving Parties

We also deny the Towns' motion because they have not demonstrated that other parties will not experience substantial harm in the event a stay is imposed pending appeal.

The Towns argue that loss of the PTCs would not result in substantial harm to GMP because the record shows that the project would still be economically viable due to the revised cost of power resulting from selection of a more efficient turbine model, and that the PTCs are needed only to maximize the benefits of the project, not to ensure its viability. The Towns also

37. Towns' Motion at 19-22; Towns' Reply at 12-13.

38. GMP Opposition at 9-10.

39. See Docket 7628, Order of 7/12/11 at 10.

40. We again consider it relevant and significant that ANR apparently believes that adequate mitigation is available for the impacts of this project because it is amenable to allowing construction to commence prior to GMP obtaining the Easements.

rely on an Environmental Court decision that equated substantial harm with irreparable harm, and note that financial harm is not considered irreparable.⁴¹

GMP argues that the Towns must demonstrate that there will be no substantial harm to GMP in the event a stay issues and contends that the Towns are unable to do so because the Board found that a delay in construction could result in the loss of the PTCs and that such a loss could undermine the economic viability of the project.⁴² GMP states that the cost of project power would increase by 24%, or at least \$3.4 million annually, if the PTCs are lost, and that such a large increase in the cost of power is a substantial harm, even if the project remains less expensive than alternatives.⁴³ Lastly, GMP asserts that the Towns incorrectly apply the standard of irreparable harm to GMP and then argue that financial harm is not considered irreparable. GMP asserts that the Towns' reliance on an Environmental Court decision to support their argument on this point is misplaced because the court improperly conflated irreparable harm and substantial harm in its analysis, and that the correct standard to be applied is substantial harm.⁴⁴

We deny the Towns' motion because they have failed to show that no substantial harm will result if the project is delayed and the PTCs are lost. Our ruling on the question of substantial harm is largely based on an issue that neither the Towns nor GMP addressed in their filings. As discussed above, the ultimate question to be decided in a Section 248 proceeding is whether a proposed project will promote the general good of the state. This means that the public interest is an essential consideration in these proceedings, and the Board is charged under Section 248(a)(2) to make sure that interest is appropriately addressed. In approving the project we found that its benefits would outweigh its impacts and therefore the public would benefit from its construction. Additionally, it is a legislated policy goal of the State of Vermont to promote the development of renewable generation projects within its borders, yet another indication that the public will benefit from the development of renewable energy generation projects that pass Section 248 review. Accordingly, if the project is delayed and potentially put

41. Towns' Motion at 22-25.

42. GMP Opposition at 11.

43. GMP Opposition at 11-12.

44. GMP Opposition at 12-13.

at risk, the general public will be substantially harmed. The Towns have failed to demonstrate otherwise.

D. Location of the Best Interests of the Public

We deny the Towns' motion because the interests of the public are best served by timely completion and operation of the project.

The Towns assert that the risk to the natural environment is too high to allow construction to proceed until after the Easements are obtained. They further contend that there is a risk that ratepayers will have to pay for a project that does not produce electricity if the project is built but GMP is not allowed to operate it because it has not obtained the Easements. Lastly, the Towns contend that ratepayer interests are best served by delaying construction because the power from the project is not needed and its costs of production would be above current market rates.⁴⁵

GMP contends that the Board has already found that the project will promote the general good of the state and that a delay could undermine the project's economic viability and that a stay is therefore not consistent with the public interest.⁴⁶

As explained in the preceding section, the Vermont Legislature has made it a state policy to promote the development of in-state renewable generating facilities. Additionally, the Towns' argument regarding habitat fragmentation is unavailing for the reasons discussed above in the section on irreparable harm. With respect to the project producing power at costs above market rates, this argument fails to account for the legislated policy goal of promoting development of renewable generating facilities in Vermont and the fact that the record shows that the power costs from the project are favorable when compared against other new renewable alternatives. Therefore, denial of the stay is consistent with the state's legislated policy goals on renewable generation and promotion of the general good. The Towns have failed to demonstrate otherwise.

45. Towns' Motion at 26-28.

46. GMP Opposition at 13.

The LMG Motions

In its Motion for Stay Pending Appeal, LMG seeks "a temporary stay of all construction activities for the Kingdom Community Wind Project pending appeal to the Vermont Supreme Court."⁴⁷ LMG joins in and incorporates by reference the Towns' motion and arguments and submitted a Supplemental Memorandum of Law in support of its own motion.⁴⁸ LMG initially asserts that the recent unauthorized clearing and road construction and maintenance by the owner of lands designated for conservation to mitigate project impacts show that it is likely to succeed on the merits of its appeal.⁴⁹ However, LMG does not explain this assertion in any detail in its arguments. All other arguments in LMG's Motion largely track the arguments raised by the Towns in their motion or arguments previously raised by LMG in its earlier reconsideration motion.

LMG also filed a Motion for Clarification in which it asks the Board to "clarify that no earth disturbances, tree clearing in the Project construction area, or other similar activities are allowed to commence until all outstanding Board, Agency of Natural Resources and U.S. Army Corps of Engineers approvals and permits are obtained."⁵⁰ LMG contends that it is not clear what sort of activities GMP believes can commence before it receives all required outstanding approvals. LMG's concerns appear to have arisen out of the recent unauthorized activity that took place on land that is designated for conservation to offset project impacts to the natural environment, as well as some tree clearing that took place within the planned access road corridor.⁵¹

GMP Opposition

GMP opposes LMG's stay motion on the same grounds that it relies on in opposing the Towns' motion.⁵² GMP also opposes LMG's Motion for Clarification because LMG does not

47. LMG Stay Motion at 1.

48. LMG Stay Motion at 1-2.

49. LMG Stay Motion at 2.

50. LMG Motion for Clarification at 1.

51. LMG Motion for Clarification at 1.

52. *See*, GMP Opposition.

even claim that the requirements of the Order are ambiguous and clarification is therefore unnecessary. GMP further asserts that it is clear, based on the indexes listing the actions that GMP must undertake prior to construction that it included with a number of its compliance filings, that it understands the requirements of the May 31 and July 12 Orders. LMG, GMP asserts, has not challenged the accuracy of these indexes and therefore has not established that clarification is necessary.

DISCUSSION

Because LMG's Motion for Stay Pending Appeal largely tracks the arguments made by the Towns in their motions, or raises arguments already rejected by the Board in considering LMG's earlier reconsideration motion,⁵³ we find that LMG has not demonstrated likelihood of success on the merits of its appeal, shown that it will suffer irreparable harm if the stay is not granted, shown that non-moving parties will not be substantially harmed if a stay is granted, or demonstrated that the interests of the public will be served by a stay. LMG's motion is therefore denied.

We also deny LMG's Motion for Clarification because the requirements in our May 31 and July 12 Orders and the CPG are clear and speak for themselves. LMG has not made a showing of any ambiguity in those documents. Additionally, GMP appears to understand the requirements of the Orders and CPG based on the indexes that it has filed along with its compliance filings, as well as its response upon discovering the recent unauthorized activities in the project area. Accordingly, LMG has not demonstrated any need for the relief it seeks and its motion is therefore denied.

CONCLUSION

For the foregoing reasons, the Towns' and LMG's Motions for Stay Pending Appeal are denied, and LMG's Motion for Clarification is denied.

SO ORDERED.

53. See, Docket 7628, Order of 7/12/11.

Dated at Montpelier, Vermont, this 6th day of September, 2011.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
)	

OFFICE OF THE CLERK

FILED: September 6, 2011

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.